



September 28, 1999

Ms. Marianna M. McGowan
Bracewell & Patterson, L.L.P
500 North Akard Street, Suite 4000
Dallas, Texas 75201-3387

OR99-2729

Dear Ms. McGowan

On behalf of the Hurst-Euless-Bedford Independent School District (the "school district"), you ask whether certain information is subject to required public disclosure under the Texas Public Information Act (the "PIA"), chapter 552 of the Government Code. Your request was assigned ID#128911.

The school district received a request for nine items of information concerning one of its current employees. You state that the school district objects to the required public disclosure of items 1, 3, 4, and 8. We assume that the school district will release to the requestor the other requested items of information, if it has not already done so. You contend that the requested information is not subject to the PIA. In addition, you assert that the information in items 1, 3, 4, and 8 is excepted from disclosure based on sections 552.022, 552.101, 552.103, and 552.107(1) of the Government Code and the attorney work product privilege. You have submitted to this office representative samples of the information at issue.¹

You argue that the information requested is not maintained by the school district, but by the school district's attorney's. Section 552.002(a) of the Government Code, which defines the information subject to disclosure under the PIA, reads as follows:

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

In this chapter, “public information” means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

The information concerns services your law firm provided the school district. You do not dispute that the information concerns the school district’s official business. Nor do you argue that the school district does not have a right of access to the information. Although the records may be in the law firms’ physical custody, they are constructively in the school district’s custody. *See* Open Records Decision No. 462 at 7 (1987). We therefore conclude that the information at issue is the school district’s information subject to the PIA. *See* Open Records Decision Nos. 499 (1988), 462 (1987).

Section 552.022 of the Government Code is not an exception to disclosure. Rather, this provision sets out certain categories of information that are public information. Thus, the school district may not withhold the requested information from disclosure based on sections 552.022 of the Government Code.

As for sections 552.103, 552.107(1) and the attorney work privilege, we conclude that the school district has waived these claims. It appears to this office that the school district has failed to raise these exceptions within the PIA statutory deadline. Gov’t Code § 552.301. Therefore, the school district may not withhold the requested information based on section 552.103, 552.107(1) or the attorney work product privilege.² *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex App.--Austin 1990, no writ), Open Records Decision No. 630 (1994); *see also* Open Records Decision Nos. 647 (section 552.111 applicable to attorney work product), 575 (1990) (section 552.103 applicable to attorney work product), 574 (1990) (discovery privileges, including work product privilege, not covered by predecessor provision of section 552.101), 515 (1988) (section 552.111 waived when not timely raised), 473 (1987) (predecessor to section 552.103 waived when not timely raised).

Some of the information contained in the documents submitted to this office for review is excepted from disclosure by common-law privacy under section 552.101 of the Government Code. Section 552.101 is not waivable. The provision excepts from disclosure “information

²This office has determined that sections 552.103 and 552.111 of the PIA are the proper exceptions for a governmental body to claim the work product privilege. *See* Open Records Decision No. 647 (1996).

considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public’s interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* We believe that when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

In this case, you state that the school district is in the early stages of an investigation of several allegations of employee misconduct, including sexual harassment, and that, consequently, no summary of the investigation exists. We, therefore, find that the school district must release the information, but with redactions of all information that identifies the witnesses and victims. We have marked the documents accordingly.

You have redacted information that identifies school district students and parents of school district students. Such information is excepted from disclosure under the federal Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g, or section 552.114 of the Government Code. *See* Open Records Decision No. 634 (1995). Under FERPA, a student’s education records must be withheld from required public disclosure only to the extent “reasonable and necessary to avoid personally identifying a particular student.” Open Records Decision Nos. 332 (1982), 206 (1978). We, therefore, agree that the school district must not release any student-identifying information in the requested records.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink that reads "Kay Hastings". The signature is written in a cursive, flowing style.

Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/nc

Ref.: ID# 128911

encl. Submitted documents

cc: Mr. Karl Tiger Hanner
2525 Wallingwood Drive, Building 14
Austin, Texas 78746
(w/o enclosures)